Phang Yeong Hau v Click Internet Traffic Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22NCC-535–10 OF 2022
MOHD ARIEF EMRAN J
17 SEPTEMBER 2024

Contract — Fraud — Representation — Claim for refund of monies paid — Plaintiff invested in investment opportunity operated by defendants — Plaintiff claimed 'Click Subscription Plan' was Ponzi scheme and illegal — Whether first to third defendants did make representations as alleged by plaintiff — Whether first to third defendants committed fraud against plaintiff — Whether 'Click Subscription Plan' was genuine or was Ponzi scheme and unlawful under Malaysian law — Whether corporate veil should be lifted and liability be imposed against second defendant — Whether there was unjust enrichment

Tort — Conspiracy — Conspiracy to injure plaintiff — Plaintiff claimed defendants conspired to injure him by inducing him to enter investment — Whether there was conspiracy to injure committed by defendants against plaintiff

Tort — Malicious process/abuse of process — Second defendant instituted claim against plaintiff and other investors — Whether suit was abuse of process and maliciously commenced against plaintiff

On the invitation of the third defendant, the plaintiff attended a meeting or seminar sometime in June 2017 held by the first defendant regarding a 'Click Subscription Plan' or scheme promoted by the first defendant. The plaintiff contended that the first to third defendants represented the following to him: (a) that the Click Subscription Plan was a business promoted by the first defendant; (b) that the first defendant and the Click Subscription Plan generated revenue by directing internet traffic to its client's websites; (c) that the business generated over 1 billion internet traffic for its clients; (d) that the capital invested in the Click Subscription Plan was guaranteed; (e) that the returns on investment from the Click Subscription Plan was around 6300% achievable within ten months; and (f) that investors could withdraw from the investment anytime without any form of charges and penalties through the portal known as Click DV. Relying on the representations, the plaintiff invested RM2,156,102 in the Click Subscription Plan from June 2017 to October 2017. The sum of RM474,500 was paid in cash directly by the

plaintiff to the first defendant, whilst the sum of RM483,500 was paid by way of four cheques to the first defendant. On the instructions of the third defendant: (i) the sum of RM1,010,602 was transferred to the fourth defendant, who was the nephew and former employee of the third defendant; and (ii) the sum of RM187,500 was paid to the fifth defendant, who was the wife of the third defendant for the purposes of the investment. The plaintiff further contended that the second defendant was the Chief Executive Officer ('CEO') and co-founder of the first defendant as well as the Click Subscription Plan. Essentially, the plaintiff claimed that: (A) the Click Subscription Plan was a Ponzi scheme and illegal under Malaysian law and that the first defendant's business was conducted fraudulently contrary to s 540 of the Companies Act 2016; (B) the corporate veil of the first defendant should be lifted and liability be imposed against the second defendant as he was the directing mind and will of the first defendant and that the first defendant was being used as a tool to commit fraud against the investors of the Click Subscription Plan promoted by the first and second defendants; (C) the second defendant abused the process of court by instituting a claim against him and the 14 other investors in Suit 100 that had since been struck off by the High Court which the plaintiff claimed it was filed with malicious purpose to injure the plaintiff; and (D) the defendants had conspired to injure him by inducing him to enter the investment. The plaintiff sought for the return of the monies that he had paid to the first defendant through the third to fifth defendants and claimed that the second defendant also be made liable for the losses suffered by him.

Held:

(1) While the YouTube videos that were shared in the online portals were not the particular representations that was shared with the plaintiff, but they showed that representations were made by the second defendant on behalf of the first defendant. The representations of an alleged investment and proposed listing of the first defendant on NASDAQ were not substantiated by any evidence, either in the videos or even during the proceedings. The defendants also did not attempt to explain the representations made in the videos, nor did they challenge the authenticity of the videos. Neither did they explain the contradictions between what was presented to the investors and what they now alleged in the proceedings. The representation that the scheme was a lawful scheme that would generate income from generating web traffic as suggested was untrue. The first and second defendants made the false representations as alleged. The second defendant also represented that he was the founder and CEO of the first defendant (see paras 42, 48 & 56–57).

(2) The first and second defendants had committed fraud against the plaintiff when they made false promises that the scheme was a genuine business and that there was legitimate Web or App capable of generating

substantial returns. There was no evidence of any generation of web traffic and how any form of income was generated from the App or from the website. This pointed that it was a fraudulent scheme that generated income as long as new members were recruited. The scheme promoted by the defendants bore the classic characteristics of a Ponzi scheme. The actions of the first and second defendants were not those of an honest business enterprise. The narrative that was portrayed to their investors was obfuscated with false promises. The convoluted version of the business promoted by the defendants showed that the scheme promoted by the second defendant was merely a Ponzi scheme. The plaintiff had proven that the first and second defendants committed fraud against him. The representations were false and were calculated to cause the plaintiff to invest in the scheme. The defendants were aware and knew that the said scheme was not real and was intended to cause losses to the plaintiff and other investors. Therefore, the version of events presented by the first and second defendants was untrue and that they committed the wrong claimed by the plaintiff (see paras 59–60, 65, 71, 78 & 85).

(3) At the very least, the scheme promoted by the defendants breached ss 8 and 137 of the Financial Services Act 2013. It was a Ponzi scheme created by the second defendant that was painted to be a crowdfunding platform. Even the crowdfunding activities of the defendants were unlawful and contrary to the requirements of the Capital Markets and Services Act 2007 ('the CMSA'). The first and second defendants committed a breach of s 212(2) of the CMSA as they did not have the requisite license or approval to undertake the activities such as promoting securities and shares. The Click Subscription Plan, as promoted by the first and second defendants, was illegal. Therefore, the plaintiff was entitled to claim for the return of the sums paid by him in accordance with ss 10, 24 and 66 of the Contracts Act 1950. As the Click Subscription Scheme was an illegal or unlawful scheme, the first and second defendants should be directed to return the monies paid by the plaintiff. The plaintiff's claim against the first and second defendants were allowed (see paras 87, 89–91 & 93).

(4) The second defendant had utilised the first defendant's corporate veil to commit fraud. The second defendant was the controlling mind of the company and was the originator or the creator of the fraudulent and unlawful scheme. He had attempted to falsely represent that he was merely an employee of the first defendant and that the first defendant was controlled by his father and a third party. However, it was the second defendant who had control over the company and created the said scheme. Therefore, this was a suitable case for the corporate veil to be lifted and liability to be imposed personally against the second defendant (see paras 94–96).

(5) The plaintiff's claims that the second defendant's Suit 100 was instituted maliciously and for an ulterior purpose was not denied in the witness statement of the said defendant. Neither did the counsel for the said defendant challenge the plaintiff's evidence on the tort of abuse of process. Therefore, as the allegations had not been rebutted by the second defendant, it was bound to be accepted that they were true. The plaintiff had incurred costs and suffered damages as a result of the wrongful suit instituted against him. Therefore, damages against the second defendant in the sum of RM200,000 for this tort was awarded (see paras 99 & 102).

(6) The fourth and fifth defendants were acting honestly in accordance with the wishes of the third defendant, and had released the monies to the first and second defendants that had been deposited by the plaintiff into their accounts as instructed. At best, they were reckless and had followed the instructions of the second defendant. This did not mean that they were party to any form of conspiracy. There was no evidence of any meeting of mind between the fourth and fifth defendants with other defendants that would suggest that they had conspired to injure the plaintiff. Therefore, the plaintiff's claim against the fourth and fifth defendants was rejected (see paras 104–106).

(7) The first and second defendants were enriched at the expense of the plaintiff. It would be wrong to allow the defendants to retain the sums of monies. The total sum paid by the plaintiff for the investment scheme was RM 2,156,102. Nevertheless, the plaintiff did receive a sum of RM229,000 in return. This amount should be deducted from the sums claimed by the plaintiff in this suit. The plaintiff should only be allowed to claim the sum of RM 1,927,102. This was a suitable case for exemplary damages to be imposed against the first and second defendants. Their conduct showed that they committed wrongs not only against the plaintiff but also against other parties as well and had profited from the said wrongs. Therefore, exemplary damages in the sum of RM1m against the first and second defendants was imposed (see paras 109, 115, 117 & 119).

[Bahasa Malaysia summary

Atas undangan defendan ketiga, plaintif telah menghadiri satu mesyuarat atau seminar pada suatu ketika pada bulan Jun 2017 yang dianjurkan oleh defendan pertama mengenai 'Pelan Langganan Klik' atau skim yang dipromosikan oleh defendan pertama. Plaintif menegaskan bahawa defendan pertama hingga ketiga telah mewakili perkara berikut kepadanya: (a) bahawa Pelan Langganan Klik adalah perniagaan yang dipromosikan oleh defendan pertama; (b) bahawa defendan pertama dan Pelan Langganan Klik menjana pendapatan dengan mengarahkan trafik internet ke laman web kliennya; (c) bahawa perniagaan tersebut menjana lebih 1 bilion trafik internet untuk kliennya; (d) bahawa modal yang dilaburkan dalam Pelan Langganan Klik dijamin; (e) bahawa

pulangan pelaburan daripada Pelan Langganan Klik adalah sekitar 6300% yang boleh dicapai dalam masa 10 bulan; dan (f) bahawa pelabur boleh mengeluarkan pelaburan pada bila-bila masa tanpa sebarang bayaran dan penalti melalui portal yang dikenali sebagai Click DV. Berdasarkan perwakilan tersebut, plaintif melabur RM2,156,102 dalam Pelan Langganan Klik dari Jun 2017 hingga Oktober 2017. Jumlah RM474,500 dibayar secara tunai terus oleh plaintif kepada defendan pertama, manakala jumlah RM483,500 dibayar melalui empat cek kepada defendan pertama. Mengikut arahan defendan ketiga: (i) jumlah RM1,010,602 telah dipindahkan kepada defendan keempat, yang merupakan anak saudara dan bekas pekerja defendan ketiga; dan (ii) jumlah RM187,500 dibayar kepada defendan kelima, yang merupakan isteri defendan ketiga untuk tujuan pelaburan. Plaintif selanjutnya menegaskan bahawa defendan kedua adalah Ketua Pegawai Eksekutif ('CEO') dan pengasas bersama defendan pertama serta Pelan Langganan Klik. Pada dasarnya, plaintif mendakwa bahawa: (A) Pelan Langganan Klik adalah satu skim Ponzi dan haram di bawah undang-undang Malaysia dan bahawa perniagaan defendan pertama dijalankan secara penipuan bertentangan dengan s 540 Akta Syarikat 2016; (B) tirai korporat defendan pertama harus diangkat dan liabiliti dikenakan terhadap defendan kedua kerana dia adalah minda dan kehendak defendan pertama dan bahawa defendan pertama digunakan sebagai alat untuk melakukan penipuan terhadap pelabur Pelan Langganan Klik yang dipromosikan oleh defendan pertama dan kedua; (C) defendan kedua menyalahgunakan proses mahkamah dengan memulakan tuntutan terhadapnya dan 14 pelabur lain dalam Saman 100 yang telah dibatalkan oleh Mahkamah Tinggi yang mana plaintif mendakwa ia difailkan dengan tujuan jahat untuk mencederakan plaintif; dan (D) defendan telah berkonspirasi untuk mencederakannya dengan memaksanya untuk menyertai pelaburan. Plaintif menuntut pengembalian wang yang telah dibayarnya kepada defendan pertama melalui defendan ketiga hingga kelima dan mendakwa bahawa defendan kedua juga harus dikenakan liabiliti atas kerugian yang dialaminya.

Diputuskan:

(1) Walaupun video YouTube yang dikongsi di portal dalam talian bukanlah perwakilan khusus yang dikongsi dengan plaintif, tetapi ia menunjukkan bahawa perwakilan telah dibuat oleh defendan kedua bagi pihak defendan pertama. Perwakilan mengenai pelaburan yang didakwa dan cadangan penyenaraian defendan pertama di NASDAQ tidak disokong oleh sebarang keterangan, sama ada dalam video atau semasa prosiding. Defendan juga tidak mencuba untuk menjelaskan perwakilan yang dibuat dalam video, mahupun mencabar kesahihan video tersebut. Mereka juga tidak menjelaskan percanggahan antara apa yang dibentangkan kepada pelabur dan apa yang mereka sekarang dakwa dalam prosiding. Perwakilan bahawa skim tersebut adalah skim yang sah yang akan menjana pendapatan daripada menjana trafik web seperti yang

dicadangkan adalah tidak benar. Defendan pertama dan kedua telah membuat perwakilan palsu seperti yang didakwa. Defendan kedua juga telah mewakili bahawa dia adalah pengasas dan CEO defendan pertama (lihat perenggan 42, 48, 56 & 57).

(2) Defendan pertama dan kedua telah melakukan penipuan terhadap plaintif apabila mereka membuat janji palsu bahawa skim tersebut adalah perniagaan yang tulen dan bahawa terdapat Web atau Aplikasi yang sah yang mampu menjana pulangan yang besar. Tiada keterangan mengenai sebarang penghasilan trafik web dan bagaimana sebarang bentuk pendapatan dihasilkan daripada Aplikasi atau daripada laman web. Ini menunjukkan bahawa ia adalah skim penipuan yang menjana pendapatan selagi anggota baru direkrut. Skim yang dipromosikan oleh defendan mempunyai ciri-ciri klasik skim Ponzi. Tindakan defendan pertama dan kedua bukanlah tindakan sebuah perusahaan perniagaan yang jujur. Naratif yang digambarkan kepada pelabur mereka telah diselubungi dengan janji palsu. Versi perniagaan yang rumit yang dipromosikan oleh defendan menunjukkan bahawa skim yang dipromosikan oleh defendan kedua hanya merupakan skim Ponzi. Plaintif telah membuktikan bahawa defendan pertama dan kedua telah melakukan penipuan terhadapnya. Perwakilan tersebut adalah palsu dan dirancang untuk menyebabkan plaintif melabur dalam skim tersebut. Defendan sedar dan tahu bahawa skim tersebut tidak benar dan bertujuan untuk menyebabkan kerugian kepada plaintif dan pelabur lain. Oleh itu, versi peristiwa yang dikemukakan oleh defendan pertama dan kedua adalah tidak benar dan mereka telah melakukan kesalahan seperti yang didakwa oleh plaintif (lihat perenggan 59–60, 65, 71, 78 & 85).

(3) Sekurang-kurangnya, skim yang dipromosikan oleh defendan melanggar ss 8 dan 137 Akta Perkhidmatan Kewangan 2013. Ia adalah skim Ponzi yang dicipta oleh defendan kedua yang digambarkan sebagai platform pendanaan awam. Malah aktiviti pendanaan awam yang dilakukan oleh defendan adalah tidak sah dan bercanggah dengan keperluan Akta Pasaran Modal dan Perkhidmatan 2007 ('APMP'). Defendan pertama dan kedua telah melanggar s 212(2) APMP kerana mereka tidak mempunyai lesen atau kelulusan yang diperlukan untuk menjalankan aktiviti seperti mempromosikan sekuriti dan saham. Pelan Langganan Klik, seperti yang dipromosikan oleh defendan pertama dan kedua, adalah haram. Oleh itu, plaintif berhak menuntut pengembalian jumlah yang dibayarnya mengikut s 10, 24 dan 66 Akta Kontrak 1950. Oleh kerana Skim Langganan Klik adalah skim yang haram atau tidak sah, defendan pertama dan kedua harus diarahkan untuk mengembalikan wang yang dibayar oleh plaintif. Tuntutan plaintif terhadap defendan pertama dan kedua dibenarkan (lihat perenggan 87, 89–91 & 93).

(4) Defendan kedua telah menggunakan tirai korporat defendan pertama untuk melakukan penipuan. Defendan kedua adalah minda pengawal syarikat dan merupakan pencipta skim yang penipuan dan tidak sah. Dia telah cuba untuk secara palsu menyatakan bahawa dia hanya seorang pekerja defendan pertama dan bahawa defendan pertama dikawal oleh bapanya dan pihak ketiga. Namun, defendan kedua yang mempunyai kawalan ke atas syarikat dan mencipta skim tersebut. Oleh itu, ini adalah kes yang sesuai untuk tirai korporat diangkat dan liabiliti dikenakan secara peribadi terhadap defendan kedua (lihat perenggan 94–96).

(5) Defendan pertama dan kedua telah mendapat keuntungan di atas kerugian plaintif. Adalah tidak wajar untuk membenarkan defendan mengekalkan jumlah wang tersebut. Jumlah keseluruhan yang dibayar oleh plaintif untuk skim pelaburan adalah RM2,156,102. Walau bagaimanapun, plaintif telah menerima jumlah RM229,000 sebagai balasan. Jumlah ini harus ditolak daripada jumlah yang dituntut oleh plaintif dalam saman ini. Plaintif hanya dibenarkan untuk menuntut jumlah RM1,927,102. Ini adalah kes yang sesuai untuk ganti rugi teladan dikenakan terhadap defendan pertama dan kedua. Tindakan mereka menunjukkan bahawa mereka telah melakukan kesalahan bukan hanya terhadap plaintif tetapi juga terhadap pihak lain dan telah mendapat keuntungan daripada kesalahan tersebut. Oleh itu, ganti rugi teladan sebanyak RM1 juta terhadap defendan pertama dan kedua dikenakan (lihat perenggan 109, 115, 117 & 119).]

Cases referred to

Cassell & Co Ltd v Broome [1972] AC 1027, HL (refd)
Conweld Engineering Sdn Bhd & Ors v Goh Swee Boh @ Goh Cheng Kin & Anor [2022] 6 MLJ 810; [2023] 1 CLJ 323, CA (refd)
Director-General of Inland Revenue v LTS [1975] 2 MLJ 30, FC (refd)
Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441; [2015] 2 CLJ 453, FC (refd)
Inland Revenue Commissioners v Aken [1990] STC 497 (refd)
International Times & Ors v Leong Ho Yuen [1980] 2 MLJ 86; [1980] CLJU 31; [1980] 1 LNS 31, FC (refd)
Liputan Simfoni Sdn Bhd v Pembangunan Orkid Desa Sdn Bhd [2019] 4 MLJ 141; [2019] 1 CLJ 183, FC (refd)
Ong Leong Chiou & Anor v Keller (M) Sdn Bhd & Ors [2021] 3 MLJ 622, FC (refd)
Patel v Mirza [2017] 1 All ER 191, SC (refd)
Patridge v Mallandaine [1886] 2 TC 179 (refd)
PJTC Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd [1980] 2 MLJ 136; [1980] 1 LNS 55, FC (refd)
Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals [2010] 5 MLJ 394; [2015] 5 CLJ 32, CA (refd)

Royal Brunei Airlines Sdn Bhd v Philip Tan Kok Ming [1995] 2 AC 378, PC (refd)
Ryall v Hoare [1923] 8 TC 521, KBD (refd)
Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd [2015] 5 MLJ 1; [2015] 7 CLJ 584, FC (refd)
Smith v Minister of National Revenue [1925] SCR 405 (refd)
Solid Investments Ltd v Alcatel-Lucent (M) Sdn Bhd (previously known as Alcatel Network Systems (M) Sdn Bhd) [2014] 3 MLJ 785; [2014] 3 CLJ 73, FC (refd)
Takako Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751; [2010] 1 CLJ 381, FC (refd)
Victor Cham & Anor v Loh Bee Tuan [2006] 5 MLJ 359; [2006] 3 CLJ 770, CA (refd)
Yeohata Machineries Sdn Bhd & Anor v Coil Master Sdn Bhd & Ors [2015] 6 MLJ 810; [2016] 4 CLJ 414, CA (refd)

Legislation referred to

Capital Markets and Services Act 2007 ss 7(1), 34, 212(2)
Companies Act 2016 s 540
Contracts Act 1950 s 10, 17
Direct Sales and Anti Pyramid Schemes Act 1993 s 27B(1)
Evidence Act 1950 ss 101, 102
Financial Services Act 2013 ss 8, 137

Gary Teh Chin Yeong (with See Zhi Peng and Chew Chee Hui) (Gary Teh & Ngiam) for the plaintiff.
Chin Nyook Chin (with Tan Ching Geok) (Anthony Ng & Rasid) for the first and second defendants.
N Nathan (with L Lingarajah) (Linga & Co) for the fourth and fifth defendants.

Mohd Arief Emran J:

INTRODUCTION

[1] The plaintiff alleged that the defendants defrauded him by promoting a false investment opportunity known as a 'Click Subscription Plan' that was allegedly operated by the first defendant and the second defendant.

[2] The plaintiff now claims for the return of the monies that he had paid to the first defendant through the third, fourth and fifth defendants and claimed that the second defendant also be made liable for the losses suffered by him.

BACKGROUND FACTS

Summary of the plaintiff's claim

[3] The plaintiff claimed that, on the invitation of the third defendant, he attended a meeting or seminar sometime in June 2017 held by the first defendant regarding a 'Click Subscription Plan' or scheme promoted by the first defendant.

[4] The plaintiff contended that the first, second and third defendants represented the following to him:

(a) that the click subscription plan is a business promoted by the first defendant;

(b) that the first defendant and the Click Subscription Plan generate revenue by directing internet traffic to its client's websites;

(c) that the business generates over 1 billion internet traffic for its clients;

(d) that the capital invested in the Click Subscription Plan is guaranteed;

(e) that the returns on investment ('ROI') from the Click Subscription Plan was around 6300% achievable within ten months; and

(f) that investors can withdraw from the investment anytime without any form of charges and penalties through the portal known as Click DV,

('the said representations')

[5] Relying on the said representations, the plaintiff invested RM2,156,102 in the Click Subscription Plan from June 2017 to October 2017 ('the said investment').

[6] The sum of RM474, 500 was paid in cash directly by the plaintiff to the first defendant, whilst the sum of RM483,500 was paid by way of four cheques to the first defendant.

[7] On the instructions of the third defendant, the sum of RM1,010,602 was transferred to the fourth defendant, who is the nephew and former employee of the third defendant, for the purpose of the said Investment.

[8] On the instruction of the third defendant, the sum of RM187,500 was paid to the fifth defendant, who is the wife of the third defendant, also for the purpose of the said Investment.

[9] As the third defendant was declared a bankrupt at the time when the above transactions took place, the plaintiff discontinued the action against the third defendant.

[10] The plaintiff further contended that the first and second defendants knew that that the said representations made to induce to him to invest were false. He claimed the following:

(a) that the second defendant was the Chief Executive Officer ('CEO') and co-founder of the first defendant as well as the Click Subscription Plan;

(b) that the first defendant did not file any financial reports with the Companies Commission of Malaysia since its incorporation;

(c) that the Click Subscription Plan was sustained only by new subscriptions and not from the business of generating internet traffic;

(d) that the first defendant did not generate sufficient revenue from the internet traffic generation;

(e) that the first defendant needed continuous investments by subscribers to meet redemptions of investments and/or its claim for ROI; and

(f) that the representation on capital guaranteed was untrue and was fraudulently represented to the plaintiff.

[11] Essentially, the plaintiff claimed that the Click Subscription Plan was a Ponzi scheme and illegal under Malaysian law and that the first defendant's business was conducted fraudulently contrary to s 540 of the Companies Act 2016 ('the CA 2016').

[12] The plaintiff also claimed that the corporate veil of the first defendant should be lifted and liability be imposed against the second defendant as he was the directing mind and will of the first defendant and that the first defendant was being used as a tool to commit fraud against the investors of the Click Subscription Plan promoted by the first and second defendants.

[13] The plaintiff further claimed that the third defendant, who also promoted the scheme to him, should also be made liable for the monies released to the fourth and fifth defendants upon the third defendant's instructions.

[14] The plaintiff further claimed that the second defendant abused the process of court by instituting a claim against him and the 14 other investors in the Suit No WA-22NCVC-100–02 of 2021 ('Suit 100'). Suit 100 had since been struck off by the High Court which the plaintiff claimed it was filed with malicious purpose to injure the plaintiff.

[15] The plaintiff further claimed that the defendants had conspired to injure him by inducing him to enter the said Investment. In the alternative, the plaintiff also claimed that the defendants were the constructive trustees of all the monies received from the plaintiff.

Summary of the first and second defendants' defence

[16] The first and second defendants contended that the Click Subscription Plan was a genuine and legitimate business plan.

[17] The second defendant claimed that he was only an employee of the company, and that the shareholders are the second defendant's father, Tan Poh Hee, as well as one Wan Zainuddin bin Wan Ibrahim. The second defendant was only employed to promote the Click Subscription Plan

[18] The third defendant claimed that he was only an introducer, entitled to commission for introducing the Click Subscription Plan to investors. The second and third defendants were only promoting the Click Subscription Plan to the plaintiff and the plaintiff's colleagues or friends before the suit was instituted, and those who were interested in joining the scheme.

[19] The first and second defendants denied providing any form of capital guarantee or making any such representations as suggested by the plaintiff. The ROI would only be realised if certain targets were met.

[20] The first and second defendants further contended that the plaintiff would also be able to generate income or credit through the Click Subscription Plan. There was no form for the return of capital, as the Click Subscription Plan was merely a tool to generate income or credit which could be sold to members of the scheme.

[21] The second defendant admitted to that the first defendant only received the payment mentioned in para 6 above from the plaintiff and not the other amount of money alleged in this claim. This meant only the sum of RM958,000 was received by the first defendant.

[22] The Click Subscription Plan worked by allowing the plaintiff to register an account, create a user ID and password in the Click DV Portal by paying the subscription fee, which then allowed the plaintiff to access the Click Subscription Plan App ('the App') and the Click DV Portal. The Click DV Portal contained information and operation regarding subscribers, not an investment as suggested by the plaintiff.

[23] The App was allegedly hacked by a third party and this caused the Click Subscription Plan to fail.

[24] In paras 30 to 35 of the first and second defendants' defence, it was clearly stated:

(a) the plaintiff only paid the subscription fee for the Click Subscription Plan;

(b) that the return to the plaintiff was dependent on the plaintiff's ability to obtain customers/members ('mendapat pelanggan'); and

(c) that the fourth and fifth defendants had only received commission based on the number of customers and targets achieved.

[25] The plaintiff was not entitled to any form of restitution or claim against the first defendant for unjust enrichment, as the first defendant had also expended costs in maintaining the Click Subscription Plan.

[26] The defendants also contended that the plaintiff had also entered into a 'Leader Incentive Agreement' on 17 November 2017.

[27] The said defendants contended that its business generated through the Click Subscription Plan worked as follows:

(a) once a customer pays the sums due for a subscription, he or she will be granted access to a web page;

(b) the customer will then browse the said webpage and must remain on the webpage for about 12 seconds to generate internet traffic;

(c) this would then generate income and he or she will get a commission of USD0.01 for each successful click. Only a maximum of 1,000 clicks per day is allowed;

(d) the maximum amount of return would then be RM40 a day. This will depend on the package subscribed to by the client or investor; and

(e) the first defendant shall also provide a data unit worth of USD 10,000 to clients and this may lead to a further return of 10%.

[28] The plaintiff had also received a commission or return of RM229,000 in the year 2018.

[29] The first and second defendants denied all allegations of fraud as alleged by the plaintiff. The second defendant also denied the claim that the earlier Suit 100 was malicious as alleged by the plaintiff.

Summary of the fourth and fifth defendants' defence

[30] The third defendant was only a subscriber in the Click Subscription Plan, who had introduced the Click Subscription Plan to the plaintiff as an investor, and not as a promoter.

[31] While the fourth and fifth defendants did receive payment from the plaintiff, it has been transferred to the first defendant.

[32] The fourth and fifth defendants were not promoters of the first defendant but were only involved as investors through the third defendant.

[33] The defendants denied that they had conspired to injure to the plaintiff as alleged.

TRIAL

[34] The following witnesses were produced by the litigants:

(a) PW1 — Tan Suan Wah;

(b) PW2 — Phang Yeong Hau;

(c) PW3 — Lee Keng Ming;

(d) DW1 — Lim Kim Bok;

(e) DW2 — Tan Kok Pin;

(f) DW3 — Tan Ee Wei;

(g) DW4 — Jordan Lee Wei Peng; and

(h) DW5 — Linda Chern Tai Lin.

ISSUES TO BE DETERMINED BY THIS COURT

[35] After perusing the pleadings, the documents filed, and the oral evidence of the witnesses, I find that the following issues need to be determined by this court:

(a) whether the first to third defendants made the representations as alleged by the plaintiff?

(b) whether the first to third defendants committed fraud against the plaintiff?

(c) whether the 'Click Subscription Plan' was genuine or whether it was a Ponzi scheme and unlawful under Malaysian law?

A (d) whether the corporate veil should be lifted and liability be imposed against the second defendant?

(e) whether the monies paid to the fourth and fifth defendants have been deposited with the first defendant and whether the fourth and fifth defendants should be liable for any sums paid to them?

B

(f) whether the Suit 100 instituted by the second defendant was an abuse of process and maliciously commenced against the plaintiff?

(g) whether there is a conspiracy to injure committed by the defendants against the plaintiff?

C

(h) who should bear the losses suffered by the plaintiff? — unjust enrichment.

D **[36]** I find that the plaintiff has proven the claim against the first and second defendants as alleged in this suit and judgment should be entered against them. My reasons for the said decision are contained in the following paragraphs.

Whether the first to third defendants did make the representations as alleged by the plaintiff?

E

[37] I note that the allegations put forth by the plaintiff against the first to third defendants pertained to the oral representations made at the meeting held in June 2017.

F

[38] The plaintiff referred to the presentation slides that were allegedly referred to by the first and second defendants and presented to him at the meeting in June 2017. He alleged that these presentation slides were shared with him by the second defendant and he alleged that the said defendant had made the following representations:

G

(a) evidence of the plaintiff to support this contention:

(i) Q4 Who are the first and second defendants?

...

H

(d) In the Click Subscription Plan events I attended, the second and third defendants appeared and explained the Click Subscription Plan to attendees, which included me.

(e) The first defendants named director, Tan Poh Hee, appeared at several events. However, he merely introduced himself as the second defendant's father and did not provide explanation for the Click Subscription Plan. Whereas, the first defendant's other named director, Wan Zainuddin bin Wan Ibrahim was never present and I have never met them. At the Click Subscription Plan events, the second defendant introduced himself as the Chief Executive Officer, founder or boss of the first defendant. The second

I

defendant informed me that the first defendant was his company and he made all the decisions for the first defendant.

(f) I say, the second defendant, is using the company structure of the first defendant to conceal himself as the real actor. I have instructed the plaintiff's solicitors to seek relief in this action so as to impose personal liability on the second defendant resulting from the fraud perpetrated by the defendants.

(ii) Q5 Tell this Honourable Court how you ended up investing in the Click Subscription Plan?

(a) I met the third defendant previously, named Gideon in a KTV sometime in late 2016 or early 2017. When we met, he informed me that he had a lucrative investment opportunity for me.

(b) Sometime in June 2017, I was invited by Gideon to attend a Click Subscription Plan event organised by the first defendant at One City Malt in Subang Jaya.

(c) Sometime thereafter, on Gideon's invitation, I met the second defendant at the first defendant's office.

(d) At this meeting, the second defendant and Gideon explained the Click Subscription Plan to me. The Click Subscription Plan is not a subscription but was a crowdfunding investment.

(e) During these meetings, the second defendant and Gideon represented to me that:

(i) The first defendant generates its revenue from fees for generating internet traffic for its customers' websites. The second defendant developed a Search Engine Optimization program to generate website traffic. This program was offered by the first defendant's business to generate internet traffic for over 1 billion of its customers' websites. Ostensibly, the defendants allege that the Click Subscription Plan was to recruit users to generate internet traffic for the first defendant's customers' websites ('Click Business representation').

(ii) Investments in the Click Subscription Plan were capital guaranteed ('Capital Guaranteed representation'). I note that in several YouTube videos, the second defendant repeated this term and/or representation. These YouTube videos were to solicit investments for the Click Subscription Plan as crowdfunding, for the first defendant's business.

(iii) The Click Subscription Plan could generate returns on investment ('ROI') of around 6300% within approximately 10 months ('ROI representation'). In hindsight, this was too good to be true but due to my naivete and perhaps avaricious sentiment, I was induced to invest.

(iv) Investors could withdraw the investments and/or ROI at any time, unconditionally ('Withdrawal representation'). This led me to believe that it was a genuine investment, (hereinafter, the Click Business representation, Capital Guaranteed representation, ROI representation and Withdrawal representation are collectively referred to as the 'representations')

(f) The representations were to induce me to invest in the Click Subscription Plan.

(g) After I had invested substantial amounts of money in the Click Subscription Plan, I was invited by the first and second defendants and Gideon to speak at other events. I cannot recall the details of those other events.

(iii) Q6 Please refer to pages 3-22 PABD. What document is this?

(a) These are slides explaining the first defendant's business which I received from the third defendant. These slides were used by the second and Gideon to explain the Click Business representation.

(b) I note that these slides explains as follows:

(i) At page 10 PABD, it is stated that 'Click is a global business which bring traffic to over 1 billion websites'.

(ii) Page 11–12 PABD explains that there is a mobile application that can be used by investors to generate traffic for the first defendant's customers.

(iv) Q7 Please refer to pages 27–45 CBOD. What document is this? (a) These are slides explaining the Click Subscription Plan ('Click Slides') that I received from Gideon. The Click Slides were used by the second defendant and Gideon to explain the Click Subscription Plan to me.

(b) At page 35 CBOD (Part B), it was stated that there are no conditions for withdrawal of investment sum. This meant to me that all investments and/or ROI could be withdrawn at any time.

(c) At page 37 CBOD (Part B), it was also stated that investments are capital guaranteed. This meant that when the investment was terminated all my capital would be returned.

(d) I did not understand what was stated in the balance of the slides. second defendant's and Gideon's promise that the investments were capital guaranteed and high ROI convinced me to invest.

[39] The defendants denied the said allegation and claims as follows:

(b) second defendant's evidence:

3. Can you name one of the products which were actively carried out by D1?

A: One of the main services provided by D1 was the selling of network traffic to customers who bought the network traffic for their website.

4. Other than selling network traffic, what other products did D1 promote?

A: D1 also promotes the Click Subscription Plan to another group of customers known as subscribers who are able to generate internet traffic by clicking on the Application created by D1. The Click Subscription Plan is simply a subscription that requires payment of subscription fee by subscriber before subscribing this Click Subscription Plan. All subscription fees paid by the customers are non-refundable.

5. Please briefly explain how the Click Subscription Plan works?

A: After subscribing the Click Subscription Plan, the plaintiff is entitled to register an account by creating a User ID and password in the Click DV Portal. I refer to the Court the document from page 217 to 240 of the Common Bundle of Documents Part B Volume 2 and subsequently being translated by a licensed translator to Malay language from page 247 to 262 of the Common Bundle of Documents Part B Volume 2.

Once the account is registered, the subscribers can login to the portal and click on the website link assigned by D1 through their system. Every click made by the subscribers will generate the network traffic for the customers who bought the network traffic for their website.

15. Mr. Tan, could you please clarify to the Court whether the purchase for the 9 invoices from the plaintiff is amount to 'subscription' or 'investment'?

A: It is 'subscription' and not 'investment'. And as far as subscription is concerned, subscription fees would never be refunded.

16. Other than those as you mentioned above that subscription fees are not meant for a refund, is there a written document to affirm that?

A: No. As what I understand. Subscription eventually will not be refunded.

39. Mr Tan, I refer to the presentation slide page 54 of the Common Bundle of Documents. The slide shown that you are the Chief Executive Officer of D1. Can you explain that?

A: I am not the Chief Executive Officer for D1, I was merely a manager employed by DLAs far as Chief Executive Officer and Co-founder are concerned for D1, I have never named myself for the above position neither in the public and in my name card nor in any written form. This is not the slide prepared by our business development colleague. Normally our slide is in English and Mandarin. As far as the slide is concerned, we have never had a slide in Malay language. Page 48 to 98 in the Common Bundle of Document, the slide or the material is not prepared by the company but it is mainly done and circulated by the third *party*.

40. Mr Tan, if so, could you confirm to the Honourable Court that you were only the employee per se and not the director.

A: Yes. My Lord. I was the employee and t worked based on DVs director instruction.

47. The plaintiff claims that there is a capital guaranteed and 6300% return of investment for the Plan subscription during the slide presentation. Can you explain for the above statement?

A: D1 has never promised for the capital guaranteed and 6300% return of investment. However, if the above is true (which I strongly denied) yet the subscribers need to fulfil the criteria in achieving of all the mechanism offered by D1. Technically the subscriber can earn up to USD70-00 per day but yet he or she need to click 7,000 times in the Clicking App in order to earn USD70-00. How if the subscribers only manage to click 700 times per day?

[40] I have also considered the evidence of Tan Ee Wei, the business development executive of the first defendant.

[41] I find that the first and second defendants' witnesses were not telling the truth and I find that their evidence not to be credible. I prefer the evidence brought forth by the plaintiff and prefer the testimonies of the plaintiff's witnesses.

[42] I am aware that the plaintiff referred to YouTube videos that were shared in the online portals by CLICK2U. While the said videos were not the particular representations that was shared with the plaintiff, but they showed that representations were made by the second defendant on behalf of the first defendant.

[43] In the videos, the second defendant referred to himself as the 'boss of the first defendant'. He also explained the manner in which the platform was promoted. He promoted the Click Subscription Plan and claimed that the monies invested would go into an alleged foundation and that the first defendant would eventually be listed on NASDAQ. Additionally, he promised that the capital invested would not be lost, as the invested sums would be converted into shares in the company once it became publicly listed.

[44] I find this to be a complete contradiction to what was stated in the first and second defendants' defence. Rather than promoting an alleged Internet Traffic Generation Subscription scheme, as suggested in their defence, the above witness statements, and during cross-examination, the second defendant attempted to sell an investment scheme in a company that will eventually be listed on the NASDAQ stock exchange. He also promoted a cryptocurrency account to the members of the scheme, that was allegedly listed to an entity known as World Exchange. This was shown in the YouTube video titled 'Click-Perkongsian daripada CEO Click Group.'

[45] I have also considered the other YouTube videos that were uploaded on the internet These, too, showed that the second defendant represented himself as the ultimate owner of the first defendant and that the Click Subscription Plan would be profitable for investors or subscribers and that the scheme was a fundraising exercise aimed at expanding the company and eventually listing on NASDAQ. As an example:

> Apa yang dia invest hah ini, duit yang dia bagi untuk apa? Untuk beli e-share. Untuk company yang akan pergi Nasdaq nanti. Lagi satu news, ini kita sudah identify lebih kurang 122 orang yang kita puny a shareholder, semua orang dekat sini kira shareholder, pad a bulan, haribulan, 26 January, kita puny a event. Ini orang akan naik kepada pentas untuk sign satu Share Transfer Agreement untuk kita punya listed company dan semua orang dekat sini pun ada peluang.

[46] The second defendant made many promises, not only regarding the Click Subscription Plan, its benefits, and that the shares that would be attributed to investors, but also concerning the existence of an alleged cryptocurrency created by the first defendant that could supposedly be used worldwide. The second defendant repeatedly promised that participating in the Click Subscription Plan would eventually lead to profits from shares held in the first defendant and that the company will eventually be listed on NASDAQ.

[47] I find that the Click Subscription Plan was actually promoted as a crowdfunding investment scheme rather than a subscription plan as alleged by the defendants. This is evident in the WhatsApp messages exchanged between the plaintiff and the second defendant, as well as excerpts from the You Tube videos featuring the second defendant:

(a) WhatsApp:

> 27-11-2018 21.43 Darren Tan: Hello, bro
>
> The investment is not collapse and it is an investment where we have to wait for return.

(b) YouTube Videos:

> Sebab kita tau, ini tiga empat country ini sangat besar marketnya dan para member dari Click Malaysia, you akan dapat keuntungan sekiranya you datang dahulu. Bila kita e-share, ada marketing planya, sesiapa duduk dikedudukan di atas, lebih cepat dapat balik modal dan dapat keuntungan yang lebih banyak pada akhirnya. Dan itu sangat penting. Ok.
>
> Bila kira berada di sini, yang paling penting, jangan lepaskan peluang. Jangan lepaskan peluang. Sebab peluang bukan selalu ada. Tapi saya tidak akan, I will not beg you to join me. Saya tidak akan paksa, merayu untuk you join saya. Sebab kita all out, kita sendiri all out. Because we put ourselves in the risk also. Bila you nak ulangan yang lebih banyak, memang ada risikonya. Itu biasa. Dan saya boleh janji you boleh dapat balik you punya modal dan keuntunganya, sekiranya kita berjalan dengan lancer dalam masa 2 tahun you boleh dapat bawa balik modal dengan keuntungan.
>
> Jangan harap pada keuntungan dengan modal bila you buat business yang lain juga tapi kita berani ada janji itu pulangan ...
>
> Kita gunakan cara angka macam mana kita bagi dia, naikkan nilai dia dan split. Dan you dapat share itu, selepas you jual balik. Ada orang beli dan you dapat keuntungan.
>
> Jadi saya sudah tengak fikir, bila saya nak pergi listed, saya kena ada modal yang lebih banyal dan active user yang lebih banyak. Active user yang lebih banyak. Jadi perlukan modal yang lebih besar, lebih banyak, saya boleh buat crowdfunding. Siapa buat crowdfunding? ... Saya buat platform, satu platform yang boleh mengumpulkan banyak modal. Dan platform itu pun

> dianggap sebagai satu business ... akhirnya saya pilih e-share. Saya boleh jualkan saya puny a share terlebih dahulu sebelum saya pergi Nasdaq. Jadi, platform itu, bila satu orang beli dengan saru orang jual, saya dapat keuntungan juga ...
>
> You cuba kira tengok, ada calculator ke. Kira tengok. 4 billion times 05, how much you have. Betul? 200 Ribu. Ini USD juga. Tengok. Dengan percentage macam itu sahaja. Jadi, ini ada satu plan yang saya ingin muiakan, Click ini adalah platform e-share yang melibatkan crowfunding. Tetapi, itu adalah tujuan crowdfunding dan nature of business, tujuan adalah crowdfunding lah.
>
> Baru Click tidak akan jadi illegal ke apa. Dia cakap Senang. Sebab bila you kumpul duit, you kena ada reason. Reason. Jadi, bila saya kumpuikan duit. Bila you bagi tax invoice dan tax invoice in bagi GST dan GST in bagi kepada government.
>
> Ini adalah kira satu transaction yang legal. Jadi saya packagekan ini sebagai subscription. Clik subscription. You ada saya puny a App. You hari hah masuk. Click, dapat 1 sen. Walaupun satu cent itu tak banyak sangat, tapi itu sudah jadi kita selamat.
>
> Tax invoice ini kira sebagai selamat la. Bila saya terima ini, tak ada masalah. Tengok, kita semua apa yang kita buat hari ini, ingin jadikan semua selamat. Company kena selamat, baru leader selamat, semua leader selamat investor akan selamat.
>
> Kalau ada masalah, adalah kita punya duit akan hilang semua? Saya bagi tahu 'Tidak'. Sebab, Click cuma adalah satu platform yang mengumpulkan modal. Fund raising. Tapi akhirnya kita guna di sini. Guna di sini. Jangan risau. Duit yang kita ambil, Click nanti kena blacklisted kea pa ke, tak payah takut Iah. Ru kita pun sudah ready. Tengok, kat sini, saya tak tulis sana Click. Kalau ada satu company ada network, dia tak boleh naik Nasdaq, tak boleh ... Jangan risau Click tak ada. Kalau Click Internet traffic tak ada. Kita ada Click Marketing lagi, ada Click apa-apa lagi ...

[48] I find that these representations of an alleged investment and proposed listing of the first defendant on NASDAQ were not substantiated by any evidence, either in the videos or even during these proceedings. The defendants also did not attempt to explain the representations made in the videos, nor did they challenge the authenticity of the videos. Neither did they explain the contradictions between what was presented to the investors and what they now alleged in these proceedings.

[49] The above shows that the defence of the Click Subscription Plan was merely a ploy by the first and second defendants to hide the reality and obscure the true nature of the transaction. It was a Ponzi scheme, or at the very least, an illegal deposit-taking scheme. It never was a genuine subscription scheme. To use the second defendant's own words, 'Click cuma adalah satu platform yang

mengumpulkan modal. Fundraising'. Therefore, I find that the defendants have been less that truthful to this court, and I reject their evidence in toto.

[50] I also note that the first and second defendants did not produce any evidence to show that the said App and the Click Subscription Plan had really worked. There was no evidence that the Click Subscription Plan generated any income or any alleged internet marketing scheme as alleged by the said defendants during the trial. To explain this failure, the defendants suggested that the said App was hacked and could not be accessed. I find this excuse unsubstantiated. The failure to explain the operation or workings of the Click Subscription Plan showed that the App was not a genuine and legitimate product. I find that it was merely a tool sold by the first and second defendants to mislead individuals such as the plaintiff. There was no such subscription scheme and this was merely a tool to mislead members of the public.

[51] My finding is further supported by the PowerPoint presentation that was allegedly prepared by the said defendants. In the said PowerPoint Presentations, the first defendant promised that the capital invested would be guaranteed by the first defendant and that the second defendant was the founder and the CEO of the company.

[52] I am aware that the Malay version of the PowerPoint presentation was disowned by the first and second defendants but I again do not accept the said contention. I find that the second defendant is the true owner of the first defendant and that all activities were undertaken at his behest. In fact, he is the alter ego of the first defendant, and all activities were taken based on his instructions and commands.

[53] When I consider the said Malay version of the PowerPoint presentation, I find that they were in substance pari materia with the English version and showed that the second defendant was the founder of the first defendant. I therefore reject the defendants' contention and find that they did prepare the Malay version of the PowerPoint presentation and are bound by its contents.

[54] The first and second defendants' counsel attempted to argue that the Click Subscription Plan was a genuine and legitimate business designed to generate income for its subscribers. Counsel suggested that the Click Subscription Scheme targeted customers that intend to boost their website and subscribers to generate traffic to their websites.

[55] However, the first and second defendants' counsel also suggested that the said scheme was an illegal pyramid scheme. The counsel also suggested that, since the plaintiff participated in the scheme and knew that that the scheme contravened s 27B(1) of the Direct Sales and Anti Pyramid Schemes Act 1993,

the claim should therefore be dismissed. Counsel referred to the plaintiff's own participation in the said scheme and how he profited from the scheme as well as recruited third parties as investors in the scheme.

[56] I find that this argument did not enhance the first and second defendants' defence. Instead, it showed that the defendants knew that the scheme was fraudulent and was unlawful. The representation that the scheme was a lawful scheme that would generate income from generating web traffic as suggested was untrue. I cannot accept the position adopted by the defendants' counsel and therefore reject the same.

[57] Therefore, based on the totality of the evidence before me, I prefer the evidence presented by the plaintiff and find that the first and second defendants made the false representations as alleged. I also find that the second defendant represented that he was the founder of the first defendant and that he was the CEO of the first defendant.

[58] I reject the said defendants' evidence and find that the second defendant evidence as well as the evidence of the said defendants' witnesses cannot be relied on. I find that their evidence contains false evidence that was concocted to support the first and second defendants' defence. In fact, the testimony of the second defendant was clearly contrary to what he himself stated in the YouTube videos produced in these proceedings. I therefore find that the scheme promoted by the defendants was an unlawful fundraising/deposit taking/investment scheme.

Whether the first to third defendants committed fraud against the plaintiff?

Whether the 'Click Subscription Plan' is genuine or whether it is a Ponzi scheme and unlawful under Malaysian law?

Claim against the first and second defendants

[59] I find that the first and second defendants had committed fraud against the plaintiff. I opine that the Click Subscription Plan was not a genuine and legitimate business, but rather a scheme perpetrated by the said defendants to entice individuals such as the plaintiff to invest. The said defendants made false promises that the scheme was a genuine business and that there was legitimate Web or App capable of generating substantial returns.

[60] The representations made by the second defendant during the seminars that were recorded and uploaded on YouTube further reinforce my finding. Even the sample of the Click App mechanism produced before me showed that the Click App was nothing more than a multi-level scheme, promising returns when more members are recruited and paid subscription into the scheme.

There was no evidence of any generation of web traffic and how any form of income was generated from the App or from the website. This points to me that it was a fraudulent scheme that generates income as long as new members are recruited. The scheme promoted by the defendants bears the classic characteristics of a Ponzi scheme.

[61] I note that the first and second defendants suggest that the plaintiff understood the risk of his investment and that he himself executed a Leader Incentive Agreement dated 17 November 2017. However, I do not find that the defendants' reliance on the said agreement absolves them from liability. The burden lies on the defendants to show that the said scheme was genuine and legitimate and that there was in existence a genuine web traffic scheme.

[62] This burden lies on the defendants pursuant to s 101 of the Evidence Act as the plaintiff has shown that the scheme was a scam perpetrated not only against the plaintiff but also against other investors. I refer to ss 101 to 103 of the Evidence Act and to the judgment of the Malaysian Federal Court in *International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86; [1980] CLJU 31; [1980] 1 LNS 31.

[63] In that case, Salleh Abas FCJ delivering the judgment of the Federal Court stated:

> For the purpose of this appeai it is necessary to bear in mind the distinction between the two senses in which the expressions burden of proof and onus of proof are used (*Nanji & Co v Jatashankar Dossa & Ors* AIR 1961 SC 1474, 1478 and *Raghavamma v Chenchamma AIR* [1964] SC 136, 143). The first sense, signified by the expression burden of proof such as referred to in s 101 of the Evidence Act is the burden of establishing a case and this rests throughout the trial on the party who asserts the affirmative of the issue. The appellants in the present appeal relied on justification and fair comment. Therefore, the burden of proving these defences rests entirely upon them (*Gatley on Libel and Slander* (7th Ed) paras 351 and 354). The second sense referred to as onus of proof, on the other hand, relates to the responsibility of adducing evidence in order to discharge the burden of proof. The onus as opposed to burden is not stable and constantly shifts during the trial from one side to the other according to the scale of evidence and other preponderates. Such shifting is one continuous process in the evaluation of evidence. According to ss 102 and 103 of the Evidence Act, if the party with whom this onus lies whether initially or subsequently as a result of its shifting does not give any or further evidence or gives evidence which is not sufficient, such party must fail. It is this onus that we are concerned with in the present appeal.

[64] This was further exacerbated by the fact that the scheme suggested by the defendants does not make any real commercial sense. I am aware that this court generally do not second-guess commercial men and if a party enters a bad bargain, then he or she is subjected to the said bargain. However, in assessing

and considering of whether the scheme was a genuine transaction, this court must consider whether the scheme, from the point of a view of a reasonable person, makes any sense in any way whatsoever to ascertain whether it was genuine and legitimate.

[65] I find that the actions of the first and second defendants were not those of an honest business enterprise. The narrative that was portrayed to their investors was obfuscated with false promises. The evidence before me shows that they were not honest in their dealings, not only with the plaintiff but also with other investors as well. I find it hard to believe that the scheme perpetrated by the first and second defendants to be genuine.

[66] Furthermore, the defendants failed explain to the satisfaction of this court the proportionality of the payment of the subscription and how it would generate income for investors. This suggests to me that the defendants were merely attempting to sell a scheme that only exists in thin air to an unsophisticated clientele. As I earlier found, the scheme was in reality an unlawful Ponzi scheme, or, at the very least an illegal deposit-taking scheme.

[67] As long as there are new subscribers, the scheme will continue to generate income from fresh subscriptions. Once that ends, the whole pyramid will collapse. This appears in paras 30 and 35 of the first and second defendants' defence, where they say that the return for the plaintiff is dependent on the plaintiff's ability to obtain customers or members ('mendapat pelanggan'/'bilangan pelanggan dan target yang diperoleh').

[68] I also opine that the actions of the first and second defendants do not reflect those of an honest and reasonable person. This indicates that the scheme was created as a scam to mislead individuals such as the plaintiff. I refer to the decision of the Privy Council in *Royal Brunei Airlines Sdn Bhd v Philip Tan Kok Ming* [1995] 2 AC 378 where the court held:

> Before considering this issue further it will be helpful to define the terms being used by looking more closely at what dishonesty means in this context. Whatever may be the position in some criminal or other contexts (see, for instance, *Reg v Ghosh* [1982] QB 1053), in the context of the accessory liability principle acting dishonestly, or with a lack of probity, which is synonymous, means simply not acting as an honest person would in the circumstances. *This is an objective standard. At first sight this may seem surprising. Honesty has a connotation of subjectivity, as distinct from the objectivity of negligence. Honesty, indeed, does have a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated. Further, honesty and its counterpart dishonesty are mostly concerned with advertent conduct, not inadvertent conduct Carelessness is not dishonesty. Thus for the most part dishonesty is to be equated with conscious impropriety. However, these subjective characteristics of honesty do not mean that individuals are free to set their own*

standards of honesty in particular circumstances. The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale, with higher or lower values according to the moral standards of each individual. If a person knowingly appropriates another's property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour.

In most situations there is little difficulty in identifying how an honest person would behave. *Honest people do not intentionally deceive others to their detriment Honest people do not knowingly take others' property. Unless there is a very good and compelling reason, an honest person does not participate in a transaction if he knows it involves a misapplication of trust assets to the detriment of the beneficiaries. Nor does an honest person in such a case deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless. However, in the situations now under consideration the position is not always so straightforward.*

[69] I state herein that I have considered the defendants' version of events. In his testimony, the second defendant suggested that the Click Subscription Plan was a genuine business transaction. He suggested that this was created to generate web traffic for his clients and that the scheme sold to the plaintiff would enable him to generate income from clicking on the web portal or through the said App created by the first defendant. As I said earlier, this was not supported by any evidence. There was no evidence of any web traffic created by the portal nor was there any evidence produced by the defendants to show that such a system was in place,

[70] To justify this inability to show the workings of the said App, the first and second defendants claimed that they were hacked and as a result the said website and the said App no longer worked. This excuse was again not supported by any evidence and was merely a bare statement made by the said defendants. I therefore do not accept the excuse and reject the same.

[71] Secondly, I find that the convoluted version of the business promoted by the defendants in the PowerPoint slide and as seen in the YouTube videos showed that the scheme promoted by the second defendant was merely a Ponzi scheme. There is no real business undertaken by the defendants. The scheme as seen in the YouTube video was merely a Ponzi scheme to collect deposits from individuals such as the plaintiff.

[72] This scheme will continue to grow as long as new depositors or subscribers are recruited by the current members. There was no real business but merely an investment scam that pays early investors with money taken from later investors to create an illusion of profits. This can be ascertained from the second defendant's own words as taken from the YouTube videos reproduced in para 46 earlier. Therefore, I have no alternative but to find that

A the Click Subscription Plan was merely a fraudulent and unlawful scheme that cannot be condoned by this court.

[73] The defendants also suggested that the payment of GST and taxes proved that the business of the first defendant was genuine. I do not accept this
B suggestion. The payment of GST and taxes to the Government of Malaysia does not automatically mean that the Click Subscription Plan was a genuine and legitimate business. It only proved that the first defendant had paid the GST and taxes due, but it does not explain whether the business itself was lawful. The same reasoning applies with regards to the declaration made to the
C Inland Revenue. This does not mean that the Click Subscription Plan was genuine.

[74] It is also trite that tax authorities do not discriminate between income
D earned legally or through unlawful activities or even fraudulent activities. See *Smith v Minister of National Revenue* [1925] SCR 405; *Director-General of Inland Revenue v LTS* [1975] 2 MLJ 30; *Ryall v Hoare* [1923] 8 TC 521; *Patridge v Mallandaine* [1886] 2 TC 179; and *Inland Revenue Commissioners v Aken* [1990] STC 497, where the court found that the income from an illegal
E activity such as prostitution is subject to tax.

[75] Furthermore, as shown earlier, the payment of GST and taxes by the first defendant was calculated to mislead the authorities and to create a false impression that the first defendant was undertaking a genuine business. I
F repeat what was said by the second defendant in the YouTube videos referred to me earlier:

> Tax invoice ini kira sebagai selamat la. Bila saya terima ini, tak ada masalah. Tengok, kita semua apa yang kita buat hari ini, ingin jadikan semua selamat. Company kena selamat, baru leader selamat, semua leader selamat investor akan selamat.

G

This, therefore, does not sway the pendulum in favor of the said defendants. Instead, this proves that the second defendant was attempting to conceal an unlawful activity and did commit fraud as alleged by the plaintiff.

H

[76] I have also considered the audited accounts of the first defendant ('the said accounts') and the defendants' contention that the said accounts presented a 'true and fair' view of its accounts and therefore justified that the said company did not commit any fraudulent activities against the plaintiff.

I

[77] I opine that the said contention is wrong. Counsel for the said defendants may have misunderstood the meaning of 'true and fair' view when accountants or auditors certify the accounts of a company. The certification of the accounts by the auditors does not mean that the transactions conducted by

the company are free from fraud, money laundering activities, or other unlawful transactions. That is not the function of the auditors. The auditors are only required to ascertain the financial statements of the company to reflect the financial position of the first defendant. The auditors are not there to ascertain the legality of the business of the first defendant.

[78] I therefore find, on a balance of probabilities, that the plaintiff has proven in his case that the first and second defendants committed fraud against him. The said representations were false and were calculated to cause the plaintiff to invest in the scheme. The defendants were aware and knew that the said scheme wa not real and was intended to cause losses to the plaintiff and other investors.

[79] In coming to the above position, I have taken into account s 17 of the Contracts Act, the decision of the Federal Court in *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1; [2015] 7 CLJ 584, *PJTC Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd* [1980] 1 LNS 55 and *Victor Cham & Anor v Loh Bee Tuan* [2006] 5 MLJ 359; [2006] 3 CLJ 770.

[80] I find that the plaintiff has shown that:

(a) the first and second defendants did make the said representations as claimed in this suit;

(b) that the said representations were intended that it would be acted upon by investors such as the plaintiff;

(c) that the plaintiff did act upon the said representations; and

(d) the first and second defendants knew that the said representations were false or at least made in the absence of any genuine belief that they were true.

[81] I reproduce again what was uttered by the second defendant in the YouTube videos:

> Sebab kita tau, ini tiga empat country ini sangat besar marketnya dan para member dari Click Malaysia, you akan dapat keuntungan sekiranya you datang dahulu. Bila kita e-share, ada marketing planya, sesiapa duduk dikedudukan di atas, lebih cepat dapat balik modal dan dapat keuntungan yang lebih banyak pada akhirnya. Dan itu sangat penting. Ok'
>
> 'Bila kira berada di sini, yang paling penting, jangan lepaskan peluang. Jangan lepaskan peluang. Sebab peluang bukan selalu ada. Tapi saya tidak akan, I will not beg you to join me. Saya tidak akan paksa, merayu untuk you join saya. Sebab kita all out, kita sendiri all out. Because we put ourselves in the risk also. Bila you nak ulangan yang lebih banyak, memang ada risikonya. Itu biasa. Dan saya boleh janji you boleh dapat balik you punya modal dan keuntunganya, sekiranya kita berjalan

dengan lancer dalam masa 2 tahun you boleh dapat bawa balik modal dengan keuntungan. Jangan harap pada keuntungan dengan modal bila you buat business yang lain juga tapi kita berani ada janji itu pulangan ...

Kita gunakan cara angka macam mana kita bagi dia, naikkan nilai dia dan split. Dan you dapat share itu, selepas you jual balik. Ada orang beli dan you dapat keuntungan.

Jadi saya sudah tengak fikir, bila saya nak pergi listed, saya kena ada modal yang lebih banyal dan active user yang lebih banyak. Active user yang lebih banyak. Jadi perlukan modal yang lebih besar, lebih banyak, saya boleh buat crowdfunding. Siapa buat crowdfunding? ... Saya buat platform, satu platform yang boleh mengumpulkan banyak modal. Dan platform itu pun dianggap sebagai satu business ... akhirnya saya pilih e-share. Saya boleh jualkan saya punya share terlebih dahulu sebelum saya pergi Nasdaq. Jadi, platform itu, bila satu orang beli dengan saru orang jual, saya dapat keuntungan juga ...

You cuba kira tengok, ada calculator ke. Kira tengok. 4 billion times 05, how much you have. Betul? 200 Ribu. Ini USD juga. Tengok. Dengan percentage macam itu sahaja. Jadi, ini ada satu plan yang saya ingin mulakan, Click ini adalah platform e-share yang melibatkan crowfunding. Tetapi, itu adalah tujuan crowdfunding dan nature of business, tujuan adalah crowdfunding lah.

Baru Click tidak akan jadi illegal ke apa. Dia cakap Senang. Sebab bila you kumpul duit, you kena ada reason. Reason. Jadi, bila saya kumpulkan duit. Bila you bagi tax invoice dan tax invoice in bagi GST dan GST in bagi kepada government.

Ini adalah kira satu transaction yang legal. Jadi saya packagekan ini sebagai subscription. Clik subscription. You ada saya puny a App. You hari hari masuk. Click, dapat 1 sen. Walaupun satu cent itu tak banyak sangat, tapi itu sudah jadi kita selamat.

Tax invoice ini kira sebagai selamat la. Bila saya terima ini, tak ada masaiah. Tengok, kita semua apa yang kita buat hari ini, ingin jadikan semua selamat. Company kena selamat, baru leader selamat, semua leader selamat investor akan selamat.

Kalau ada masalah, adalah kita punya duit akan hilang semua? Saya bagi tahu 'Tidak'. Sebab, Click cuma adalah satu platform yang mengumpulkan modal. Fund raising. Tapi akhirnya kita guna di sini. Guna di sini. Jangan risau. Duit yang kita ambii, Click nanti kena blacklisted kea pa ke, tak pay ah takut Iah. Ru kita pun sudah ready. Tengok, kat sini, saya tak tulis sana Click. Kalau ada satu company ada network, dia tak boleh naik Nasdaq, tak boleh ... Jangan risau Click tak ada. Kalau Click Internet traffic tak ada. Kita ada Click Marketing lagi, ada Click apa-apa lagi ...

[82] The scheme was designed as a scheme to mislead investors. As long as there are sufficient new investors, the scheme will grow. If that trend does not continue, then the pyramid will eventually collapse due to lack of new funds to generate profits for the founders of the scheme.

[83] The Click Subscription Plan was falsely represented to be a legitimate

investment opportunity, misrepresented to be that of a legitimate internet subscription product. Instead, in reality, it was a Ponzi scheme created to enrich the defendants at the expense of the plaintiff and other investors.

[84] The defendants had also failed to prove the existence of any revenue it allegedly generated from the subscription scheme. The second defendant repeatedly said that the first defendant was generating income from advertisers and users of the click subscription scheme. Nonetheless, not an iota of evidence was produced before this court to support the said contention. There was no real evidence produced by the defendants to show the existence of any genuine business. Instead, what has been shown was merely an App that led to the ether with no real customers or clients to justify the tale spun by the first and second defendants.

[85] Therefore, I find that the version of events presented by the first and second defendants to be untrue and that they committed the wrong claimed by the plaintiff.

Is the scheme unlawful under Malaysian law?

[86] Based on the above I find that the scheme undertaken by the first and second defendant contravenes the following laws:

(a) breach of ss 8 and 137 Financial Services Act:

(b) s 2:

> 'approved business' means any business set out in Division 1 of Part 1 of Schedule 1
>
> 'authorized business' means a licensed business or an approved business;
>
> 'deposit' means a sum of money accepted or paid on terms under which it will be repaid in full, with or without interest or any other consideration in money or money's worth, either on demand or at a time or in circumstances agreed by or on behalf of the person making the payment and the person accepting it, but excludes money paid bona fide —
>
> (a) by way of an advance or a part payment under a contract for the sale, hire or other provision of property or services, and is repayable only in the event that the property or services are not in fact sold, hired or otherwise provided;
>
> (b) by way of security for the performance of a contract or by way of security in respect of any loss which may result from the nonperformance of a contract;
>
> (c) without limiting paragraph (b), by way of security for the delivery up or return of any property, whether in a particular state of repair or otherwise; and in such other circumstances, or to or by such other person, as set out in Schedule 2;

A Section 8

(1) No person shall carry on any authorized business unless it is —

(a) licensed by the Minister, on the recommendation of the Bank, under section 10 to carry on banking business, insurance business or investment
B banking business; or

Section 137

(1) No person shall accept deposits except under a licence granted under section 10 regardless of whether the transaction is described as a loan, an
C advance, an investment, a savings, a sale or a sale and repurchase or by whatever name called.

(2) Any person who contravenes subsection (1) commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding ten years or to a fine not exceeding fifty million ringgit or to both

D

(c) breach of s 7(1) of the Capital Markets and Services Act 2007 by establishing, operating or maintaining a market for crowdfunding activities not authorised by the Securities Commission;

(d) s 7(1) of the Capital Markets and Services Act:
E

(1) A person shall not establish, operate or maintain, or assist in establishing, operating or maintaining, or hold himself out as providing, operating or maintaining, a stock market or derivatives market that is not —

(e) a recognized market

F

(e) s 34 of the Capital Markets and Services Act

(1) For the purposes of paragraph 7(1)(e), the Commission may upon application by a person, register the person as a recognized market operator
(Note that the above must be read together with the Guidelines and
G Regulation of Markets under s 34 (SC-GL/2–2015) that provides rules and regulations for crowdfunding activities and the creation of a platform for such activities;

(f) s 27B of the Direct Sales and Anti-Pyramid Scheme Act 1993:
H

(1) No person shall promote or cause to be promoted a pyramid scheme.

(2) Any person who contravenes subsection (1) shall be guilty of an offence and shall, on conviction, be liable —

(a) where such person is a body corporate, partnership or society, to a fine of
I not less than one million hnggit and not more than ten million ringgit and, for a second or subsequent offence, to a fine of not less than ten million ringgit and not more than fifty million ringgit.

(b) where such person is not a body corporate, partnership or society, to a fine of not less than five hundred thousand ringgit and not more than five million

ringgit or to imprisonment for a term not exceeding five years or to both and, for a second or subsequent offence, to a fine of not less than one million ringgit and not more than ten million ringgit or to imprisonment for a term not exceeding ten years or to both.

(3) Where a person, being a director, manager, secretary or other similar officer of a body corporate, a partner in a partnership or an office-bearer in a society, as the case may be, is guilty of an offence under this section by virtue of section 38, he shall be liable to the penalty provided for under paragraph (2)(b).

[87] It is clear to me that at the very least, the scheme promoted by the defendants breaches ss 8 and 137 of the Financial Services Act. It is a Ponzi scheme created by the second defendant that was painted to be a crowdfunding platform. Even the crowdfunding activities of the defendants were unlawful and contrary to the requirements of the Capital Markets and Services Act as highlighted earlier.

[88] Furthermore, the first and second defendants marketed the scheme to attract investors by packaging an alleged 'e-share' that would be given to subscribers, with plans to list for the company to be listed on NASDAQ or any other stock exchanges. These were lofty promises presented to the public at large to attract investors such as the plaintiff. This was conceded by the second defendant when queried by this court.

[89] Therefore, the first and second defendants committed a breach of s 212(2) of the Capital Markets and Services Act. The first and second defendant did not have the requisite license or approval to undertake the activities such as promoting securities and shares, as they did in this case. These are regulated activities that could only be undertaken with the approval of the Securities Commission.

[90] For the above reason, I find the Click Subscription Plan, as promoted by the first and second defendants, is illegal. Therefore, the plaintiff is entitled to claim for the return of the sums paid by him in accordance with ss 10, 24 and 66 of the Contracts Act.

[91] As the Click Subscription Scheme was an illegal or unlawful scheme, the first and second defendants should be directed to return the monies paid by the plaintiff. I refer to *Patel v Mirza* [2017] 1 All ER 191 as applied in Malaysia by the Federal Court in *Liputan Simfoni Sdn Bhd v Pembangunan Orkid Desa Sdn Bhd* [2019] 4 MLJ 141; [2019] 1 CLJ 183.

[92] The issue before the UK Supreme Court was whether the claimant in that case was precluded from recovering monies that were paid for an illegal

activity. Lord Toulson formulated the following test for the court to use when dealing with such issues:

> [120] The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary (a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, (b) to consider any other relevant public policy on which the denial of the claim may have an impact and(c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate.

[93] I find that the purpose of the provisos referred to earlier, was to protect members of the public. To deny the claim and to allow the first and second defendants to retain the sums paid by the plaintiff would not achieve the purpose of the legislation. The public interest is best served by allowing the plaintiff the right to recover the principal sums paid, minus whatever sums that were paid by the said defendants to him during the lifetime of the scheme. I therefore allow the plaintiffs claim against the first and second defendants.

Whether the corporate veil should be lifted and liability be imposed against the second defendant?

[94] I also find that the second defendant had utilised the first defendant's corporate veil to commit fraud. I refer to the decision of the Federal Court in *Ong Leong Chiou & Anor v Keller (M) Sdn Bhd & Ors* [2021] 3 MLJ 622. In that case, Nalini Pathmanathan FCJ held:

> [46] I comprehend this paragraph as stating that:
>
> (a) The company's veil of incorporation might be lifted if it is being utilised for some relevant wrongdoing;
>
> (b) The first step is to identify such relevant wrongdoing. In this context the interchangeable use of 'fagade' and 'sham' is too vague and gives rise to confusion;
>
> (c) Two distinct principles lie behind the terms 'fagade' and 'sham' respectively;

(d) Where the wrongdoing relates to the abuse of the corporate personality as a 'fagade' the principle to be applied is that of concealment. This principle does not entail the piercing of the corporate veil. The interposition of a company or perhaps several companies so as to conceal the identity of the real actors will not prevent the courts from identifying the real actors. There is no piercing because the court is not disregarding the fagade but looking behind it to discover the facts which the corporate structure is concealing;

(e) Where the wrongdoing relates to the abuse of the corporate personality as a 'sham' the principle to be utilised is that of evasion. In evasion the court may disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company's involvement and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement; and

(f) Many cases will fall into both categories.

[48] These included *Gilford Motor Company Ltd. v Home* [1933] Ch 935 which Lord Sumption decreed was a correct application of the evasion principle, warranting piercing. Less so in *Jones v Lipman* [1962] 1 All ER 442 . Similarly he was of the view that in *Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734 and *Trustor AB v Smallbone* [2001] 3 All ER 987 there was confusion between the two principles as these cases more properly fell within the concealment principle, as the evasion principle was not engaged. This was because neither of the protagonists in these cases had utilised the company's separate legal personality to evade a liability they would otherwise have had.

[49] Their liability to account was more properly explained by the true facts that the companies in question had received monies as their respective agent or nominee. Lord Sumption concluded (at para 35) by summarising that there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court is then entitled to pierce the corporate veil for the purpose of depriving the company or its controller of the advantage they would otherwise have obtained by the company's separate legal personality. But if some other legal relationship may be utilised to resolve the matter, then piercing the corporate veil ought not to be the recourse.

[50] The consequences of applying the concealment and evasion principles in relation to the wrongdoing in issue also gives rise, theoretically at least, to different consequences in law. When the concealment principle is applicable to a particular wrongdoing, it follows that the court may disregard the corporate shell or personality to enable it to look behind the fagade and determine the true facts that were being concealed by the use of the corporate personality. The latter does not preclude the court from determining the truth of the matter in issue. However, no piercing of the corporate veil is involved when applying the concealment principle to enable the court to look behind the fagade of the corporate personality. The fagade is disregarded in order to enable the court to look at the real facts behind the corporate structure. Or which have been hidden behind the corporate structure.

> Neither does it follow that liability is necessarily visited upon the corporate personality or the controller of the company
>
> [51] The evasion principle, however, is only applicable if there is a legal right available against the controller of the company, independently of the company's involvement. The company is interposed to frustrate the enforcement of the right or to defeat the legal right.
>
> [52] When applicable to a particular wrongdoing, it enables the Court to pierce the veil and impose liability against the controller, the company, or both. The imposition of liability follows from the application of the evasion principle. It is therefore apparent that liability can devolve upon more than just the actor who is the alter-ego of the company or series of companies. Liability can evolve on other related parties too.

[95] The second defendant was the controlling mind of the company and was the originator or the creator of the fraudulent and unlawful scheme. This is evident in the evidence before me and as reproduced in the preceding paragraphs. He had attempted to falsely represent that he was merely an employee of the first defendant and that the first defendant was controlled by his father and a third party. However, when I consider the facts and evidences before me, it was the second defendant who had control over the company and created the said scheme.

[96] Therefore, I find that this is a suitable case for the corporate veil to be lifted and liability to be imposed personally against the second defendant.

Whether the Suit 100 instituted by the second defendant is an abuse of process and maliciously commenced against the plaintiff?

[97] For the tort of abuse of process or collateral abuse, the plaintiff must prove that:

(a) the process complained of must have been initiated;

(b) the purpose of initiating the process must be for something other than the genuine redress; and

(c) the plaintiff must have suffered damage or injury as a result.

[98] I refer to *Conweld Engineering Sdn Bhd & Ors v Goh Swee Boh @ Goh Cheng Kin & Anor* [2022] 6 MLJ 810; [2023] 1 CLJ 323 where S Natha Balan JCA:

> [43] In so far Lee Tat is concerned, our position is that we are not inclined to take the route that was taken by the Singapore Court of Appeal. We agree with and endorse the approach that was taken by the judge and see no reason to depart from the decision of the Court of Appeal in MBSB. In MBSB, the Court of Appeal

recognised the tort of collateral abuse of process as giving rise to a distinct cause of action. At p 435 (MLJ); pp 434 to 435 (CLJ) the Court of Appeal said:

> Every person who is aggrieved by some wrong he considers done him is at liberty to invoke the process to enforce some claim which he perceives he has against another. When however, the process of the court is invoked, not for the genuine purpose of obtaining the relief claimed, but for a collateral purpose, for example, to oppress the defendant, it becomes an abuse of process. Where the court's process is abused, the proceedings complained of may be stayed, or if it is too late to grant a stay, the party injured may bring an action based on the tort of collateral abuse of process.

[44] Based on MBSB, the essential elements for the tort of abuse of process are:

(i) the process complained of must have been initiated;

(ii) the purpose for initiating that process must be some purpose other than to obtain genuine redress which the process offers. In other words, the dominant purpose for which the process was invoked must be collateral, that is to say, aimed at producing a result not intended by the invocation of the process; and

(iii) the plaintiff must have suffered some damage or injury in consequence.

[99] The plaintiff's claims that the second defendant's suit (Suit 100) was instituted maliciously and for an ulterior purpose was not denied in the witness statement of the said defendant. Neither did the counsel for the said defendant challenge the plaintiff's evidence on the tort of abuse of process. Therefore, as the allegations have not been rebutted by the second defendant, this court is bound to accept that they are true.

[100] I refer to the decision of the Federal Court in *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751; [2010] 1 CLJ 381, where Gopal Sri Ram FCJ held:

> [4] In our judgment, two consequences inevitably followed when the first respondent who was fully conversant with the facts studiously refrained from giving evidence. In the first place, the evidence given by the appellant ought to have been presumed to be true. As Elphinstone CJ said in *Wasakah Singh v Bachan Singh* [1931] 1 MC 125 at p 128:
>
> > If the party on whom the burden of proof lies gives or calls evidence which, if it is believed, is sufficient to prove his case, then the judge is bound to call upon the other party, and has no power to hold that the first party has failed to prove his case merely because the judge does not believe his evidence. At this stage, the truth or falsity of the evidence is immaterial. For the purpose of testing whether there is a case to answer, all the evidence given must be presumed to be true.
>
> Now, what the trial judge did in the present case is precisely what he ought not to have done. He expressed dissatisfaction with the appellant's evidence without asking himself that most vital question: does the first defendant/respondent have

> a case to answer? This failure on the part of the trial judge is a serious non-direction amounting to a misdirection which occasioned a miscarriage of justice. The trial judge was at that stage not concerned with his belief of the appellant's evidence. She had given her explanation as to the discrepancies in the figures. And her evidence does not appear to be either inherently incredible or inherently improbable. In these circumstances it was the duty of the judge to have accepted her evidence as true in the absence of any evidence from the first respondent going the other way. He however failed to direct himself in this fashion thereby occasioning a serious miscarriage of justice.

[5] The second consequence is that the court ought to have drawn an adverse inference against the first respondent on the amount of the appellant's contribution to the purchase price as well as the existence and the terms of the mutual understanding or agreement that she had with the first respondent. Where, as here, the first respondent being a party to the action provides no reasons as to why she did not care to give evidence the court will normally draw an adverse inference. See *Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd* [1991] 1 CLJ 9; [1991] 1 CLJ Rep 155. See also, *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor* [1997] 4 CLJ 509 where Peh Swee Chin FCJ said: The respondents had chosen to close the case at the end of the appellants' case. Although they were entitled to do so, they would be in peril of not having the evidence of their most important witness and of having an adverse inference drawn against them for failing to call such evidence should the circumstances demand it.' There are two other authorities that are of assistance on the point. In *Wisniewski v. Central Manchester Health Authority* [1998] PIQR 324, Brooke LJ when delivering the judgment of the Court of Appeal quoted from a number of authorities including the following passage from the speech of Lord Diplock in *Herrington v British Railways Board* [1972] AC 877*:*

> The appellants, who are a public corporation, elected to call no witnesses, thus depriving the court of any positive evidence as to whether the condition of the fence and the adjacent terrain had been noticed by any particular servant of theirs or as to what he or any other of their servants either thought or did about it This is a legitimate tactical move under our adversarial system of litigation. But a defendant who adopts it cannot complain if the court draws from the facts which have been disclosed all reasonable inferences as to what are the facts which the defendant has chosen to withhold.

Brooke LJ then went on to say this:

> From this line of authority, I derive the following principles in the context of the present case:
>
> (1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is wilting to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
>
> (2) There must, however, have been some evidence, however weak, adduced by

A

the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.

(3) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.

B

The other case is *Crawford v Financial institutions Services Ltd (Jamaica)* [2005] UKPC 40, where Lord Walker of Gestingthorpe when delivering the Advice of the Privy Council said:

C

It is well settled that in civil proceedings the court may draw adverse inferences from a defendant's decision not to give or call evidence as to matters within the knowledge of himself or his employees.

[6] *Sarkaron Evidence* (16th Ed) at p 1837 states:

D

It is the bounden duty of a party personally knowing the whole circumstances to give evidence and to submit to cross-examination. Non-appearance as a witness would be the strongest possible circumstance to discredit the truth of his case *Gurbakhsh v Gurdial, A* [1927] PC 230.

E

[101] I also referred to *Solid Investments Ltd v Alcatel-Lucent (M) Sdn Bhd (previously known as Alcatel Network Systems (M) Sdn Bhd)* [2014] 3 MLJ 785; [2014] 3 CLJ 73.

F

[102] I also find that the plaintiff had incurred costs and suffered damages as a result of the wrongful suit instituted against him. I therefore award damages against the second defendant in the sum of RM200,000 for this tort.

G

Whether there is a conspiracy to injure committed by the defendants against the plaintiff?

[103] I must remind myself that the plaintiff has chosen not to continue the claim against the third defendant as he is a bankrupt.

H

[104] The evidence before me shows that the fourth and fifth defendants only acted on the instructions of the third defendant. They did not participate in the scheme and the evidence before me did not show that they were aware of the scheme promoted by the second defendant. I find that they were acting honestly in accordance with the wishes of the third defendant, and had released the monies to the first and second defendants that had been deposited by the plaintiff into their accounts as instructed. At best, they were reckless and had followed the instructions of the second defendant. This does not mean that they were party to any form of conspiracy as alleged by the plaintiff.

I

[105] I do not find any evidence of any meeting of mind between the fourth and fifth defendants with other defendants that would suggest that they had conspired to injure the plaintiff. See the applicable test to prove a claim for conspiracy as stated in *Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals* [2010] 5 MLJ 394; [2015] 5 CLJ 32 and *Yeohata Machineries Sdn Bhd & Anor v Coil Master Sdn Bhd & Ors* [2015] 6 MLJ 810; [2016] 4 CLJ 414.

[106] Therefore, I reject the plaintiff's claim against the fourth and fifth defendants. However, as predicated earlier, I find that the first and second defendants committed the wrongs as alleged by the plaintiff.

Who should bear the losses suffered by the plaintiff? — Unjust ernrichment

[107] On the issue of unjust enrichment, I have considered the test laid down by the Federal Court in *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441; [2015] 2 CLJ 453.

[108] In that case, Azahar FCJ (as he then was) held:

> [117] The above passages from the judgments of the House of Lords are instructive and are a significant contribution to the development of the law of unjust enrichment. The principle underlying the cases of *Banque Financiere de la Cite v Pare (Battersea) Ltd. And Others* and *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners and Another* is that, in the context of the present case, a cause of action in unjust enrichment can give rise to a right to restitution where it can be established that:
>
> (a) the plaintiff must have been enriched;
>
> (b) the enrichment must be gained at the defendant's expense;
>
> (c) that the retention of the benefit by the plaintiff was unjust; and
>
> (d) there must be no defence available to extinguish or reduce the plaintiff's liability to make restitution.
>
> [118] Nearer home, there is now no longer any question that unjust enrichment law is a new developing area of law which is recognised by our courts. That the principle of unjust enrichment is the basis to justify an award of restitutionary relief can be seen in *Sediperak Sdn Bhd v. Baboo Chowdhury* [1999] 5 MLJ 229; [1999] 5 CLJ 31 *and in Air Express International (M) Sdn Bhd v MISC Agencies Sdn Bhd* [2012] 4 MLJ 59; [2012] 4 CLJ 589. Nevertheless, it has to be said that despite the increase in judicial reference to the expression of unjust enrichment to justify an award of restitutionary reliefs, the law of unjust enrichment is still in its formative stage in our jurisdiction (see article entitled *An Introduction to the Law of Unjust Enrichment* [2013] 5 MLJ 1 by Alvin W-L See). In our view, the time has come for this court to recognise the law of unjust enrichment by which justice is done in a range factual circumstances, and that the restitutionary remedy is at ail times so applied to attain justice.'

[109] In this case, it is clear that the first and second defendants were enriched at the expense of the plaintiff. The plaintiff had paid substantial sums of monies to the first defendant due to the second defendant's fraudulent representations and based on the unlawful or fraudulent scheme. It would be wrong to allow the defendants to retain the sums of monies. Equity demands the first and second defendants to restitute the plaintiff.

[110] The only issue left for this court to determine is the amount that should be paid by the said first and second defendants to the plaintiff.

[111] The evidence before me shows that the plaintiff relied on the said representation made by the second defendant and paid the sum of RM2,156,102 from June 2017 to October 2017 to the first defendant or to other persons on the instructions of the first and second defendants.

[112] I find that the plaintiff has shown that he paid RM474,500 in cash directly to the first defendant and RM483,500 by way of four cheques to the first defendant.

[113] I also find that the plaintiff had proven that he transferred 1,010,602, on the instruction of the third defendant, to the fourth defendant for the purpose of the investment scheme. The fourth defendant is the nephew and former employee of the third defendant.

[114] I also find that the plaintiff had transferred RM187,500, on the instruction of the third defendant, to the fifth defendant also for the purpose of the investment scheme. The fifth defendant is the third defendant's wife. These were also made at the instructions of the first and second defendants.

[115] Therefore, the total sum paid by the plaintiff for the investment scheme was RM2,156,102. Nevertheless, the plaintiff did receive a sum of RM229,000 in return. This amount should be deducted from the sums claimed by the plaintiff in this suit. In the circumstance, the plaintiff should only be allowed to claim the sum of RM1,927,102.

[116] As stated earlier, I also award damages of RM200,000 as against the second defendant as damages suffered by the plaintiff for the Suit 100 maliciously commenced by the second defendant against him.

[117] I further find that this is a suitable case for exemplary damages to be imposed against the first and second defendants. Their conduct showed that they committed wrongs not only against the plaintiff but also against other parties as well and had profited from the said wrongs.

[118] The actions of the defendants, calculated to mislead the general public about the investment scheme, were wrong. The second defendant even had the audacity to claim that he was not the real alter ego of the company, alleging that he was merely an employee or agent of the company, when these actions were clearly calculated to create a Ponzi scheme to defraud the public and eventually disappear with the proceeds collected from individuals such as the plaintiff. I refer to the decision of the House of Lords in *Cassell & Co Ltd v Broome* [1972] AC 1027.

[119] Therefore, I find that this court should impose exemplary damages to the sum of RM1m against the first and second defendants.

Order accordingly.

Reported by Nabilah Syahida Abdullah Salleh